

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-S-1082-SB-2004

Date of decision: 24.8.2015

Kayum Khan

.....Appellant(s)

Versus

State of Haryana

.....Respondent(s)

CORAM:- HON'BLE MR.JUSTICE DARSHAN SINGH

- 1. Whether reporters of local newspapers may be allowed to see judgment? Yes**
- 2. To be referred to reporters or not? Yes**
- 3. Whether the judgment should be reported in the Digest? Yes**

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Present: Mr. Karan Pathak, Advocate for the appellant(s).

Mr. Anil Mehta, DAG, Haryana.

DARSHAN SINGH, J.

1. The present appeal has been preferred against the judgment of conviction dated 3.5.2004 vide which appellant-accused Kayum Khan has been held guilty and convicted for the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called 'the Act') and the order on the quantum of sentence dated 4.5.2004 vide which the appellant has been sentenced to undergo rigorous imprisonment for a period of 5 years and to pay a fine of Rs.25,000/-, in default of payment of fine, he was ordered to further undergo rigorous imprisonment for a period of 1¼ years.

2. The brief facts of the prosecution case are that on 9.7.2000 the police party headed by PW-6 Inspector Swatanter Singh was present

near Nahar Singh Stadium, Faridabad in connection with patrolling. A maruti car bearing registration No.DL-CA-9422 came from the side of Nahar Singh Stadium, Faridabad. On seeing the police party, the vehicle was reversed which arose suspicion. The occupants of the vehicle i.e. the present accused-appellant Kayum Khan, Akib Ali Khan and Raj Kumar (since deceased) were apprehended. They were suspected to be carrying some contraband. The Investigating Officer served a notice Ex.PG under Section 50 of the Act. They gave reply Ex.PG/1 and expressed their desire to be searched in the presence of some Gazetted Officer. PW-1 ASP M.Ravi Kiran was called and in his supervision, the search and seizure was conducted. 100 gms smack kept wrapped in a wax paper was recovered from the front pocket of the shirt of co-accused Akib Ali Khan. Two samples of 5 grams each were separated. The separate sealed parcels of samples and residue smack were prepared and were taken into possession vide memo Ex.PA. The Investigating Officer sent ruqa Ex.PC/1 to the Police Station on the basis of which the formal FIR Ex.PC was registered. The Investigating Officer prepared the rough site plan of the place of recovery Ex.PH. The report Ex.PB was sent to the senior police officers. Accused was arrested. One of the sample parcel was sent to the Forensic Science Laboratory, Madhuban Karnal for examination. On receipt of the report of the FSL Ex.PF and completion of the formalities of investigation, the report under Section 173 Cr.P.C. was presented in the Court.

3. It is pertinent to mention that during trial co-accused Raj Kumar died. The trial of the present appellant was separated vide order dated 26.3.2003 as co-accused Akib Ali Khan was confined in Alipur Central Jail, Calcutta.

4. Accused-appellant was charge-sheeted for the offence

punishable under Section 20 of the Act to which he pleaded not guilty and claimed trial.

5. In order to substantiate its case, the prosecution examined as many as 7 witnesses.

6. When examined under Section 313 Cr.P.C., the appellant pleaded that he has been falsely implicated in this case and witnesses have deposed falsely being the official witnesses.

7. On appreciating the evidence on record and the contentions raised by the learned counsel for the parties, the appellant was held guilty and convicted for the offence punishable under Section 20 of the Act and was awarded sentence as mentioned in the upper part of the judgment.

8. Aggrieved with the aforesaid judgment of conviction and order on the quantum of sentence, the present appeal has been preferred.

9. I have heard Mr. Karan Pathak, learned counsel for the appellant and Mr. Anil Mehta, DAG, Haryana for the respondent-State and have meticulously examined the record of the case.

10. Initiating the arguments, learned counsel for the appellant contended that as per the prosecution version, one Parveen Kumar was associated in the investigation as an independent witness but he has not been examined. He further contended that as per the admitted case of the prosecution, the recovery has been effected from the personal search of co-accused Akib Ali Khan and no recovery of the contraband has been effected from the possession of the present appellant. There was no evidence to show that there was any conspiracy between the present appellant and Akib Ali Khan. Mere this fact that Akib Ali Khan was also travelling in the car being driven by the present appellant will not establish the possession much less the conscious possession of the contraband by the appellant. Thus, he contended that the conviction of the appellant has

been wrongly recorded.

11. On the other hand, learned State counsel contended that it is established from the evidence on record that the appellant and his co-accused Akib Ali Khan were travelling together in the car being driven by the present appellant. They were known to each other. The appellant has not explained or shown as to how he and Akib Ali Khan were travelling together from the same destination in the vehicle which was not a public vehicle. Thus, he contended that the present appellant was also in possession of the contraband recovered from the search of co-accused Akib Ali Khan. In support of his contentions, the learned State counsel relied upon case **Madan Lal and another versus State of Himachal Pradesh 2003 (4) RCR (Criminal) 100.**

12. I have duly considered the aforesaid contentions.

13. The case of the prosecution is that Akib Ali Khan, appellant-Kayum Khan and Raj Kumar @ Ganja were found in possession of 100 gms smack. So, the present appellant has been prosecuted for the possession of 100 gm smack. In order to make the possession illicit, there must be conscious possession. Unless the possession is coupled with requisite mental element i.e the conscious possession and not merely the custody without awareness of the nature of such possession, the penal provisions of the Act are not attracted. Word “conscious” means awareness about a particular fact. It is a state of mind which is deliberate or intended. No doubt, the possession need not be physical possession but it can be constructive also. But in that case, the person concerned should have power and control over the article in question, while the person who has the physical possession holds the article subject to that power and control. In order to establish the conscious possession first the possession whether physical or constructive has to be established. In the

instant case, what to talk of the conscious possession even the possession of the appellant over the contraband is not established at all.

14. It is the admitted case of the prosecution that 100 gms smack has been recovered from the personal search of co-accused Akib Ali Khan i.e. from the front pocket of his shirt. The prosecution has examined three witnesses on the point of search and seizure. They are PW-1 ASP M. Ravi Kiran, PW-6 Inspector Swatanter Singh, the Investigating Officer, and PW-7 Pritpal Singh, SI, the witness of recovery. All of them have consistently deposed that the contraband was recovered from the pocket of shirt of co-accused Akib Ali Khan as a result of his personal search. They have categorically deposed that no recovery was effected from the present appellant. So, it is a case where the contraband has been recovered from the personal search of co-accused Akib Ali Khan and no recovery was effected from the present appellant or the car driven by him.

15. There are absolutely no allegation in the FIR, the documents prepared by the Investigating Officer or the statements of the witnesses that co-accused Akib Ali Khan was in possession of the contraband as a result of any conspiracy or agreement between the present appellant and co-accused Akib Ali Khan. There is also no allegation or proof from the side of the prosecution that the appellant was in constructive possession of the contraband and he has handed over the contraband to Akib Ali Khan. All the three accused were apprehended at the spot and were duly interrogated by the Investigating Officer. PW-1 Sh. M. Ravi Kiran, has categorically stated that the interrogation was only verbal and written disclosures of the accused were not recorded. Thus, there is no evidence on record to establish that appellant-Kayum Khan was having any control over the contraband recovered from the personal search of co-accused Akib Ali Khan. So, it is pure and simple case of the recovery of contraband

from the possession of co-accused Akib Ali Khan as a result of his personal search.

16. The Investigating Officer has also not collected any evidence to establish as to what was the inter se connection between the occupants of the car. There is also no evidence to show that they had started from the same destination. It is also not the case of joint possession as the recovery has been effected exclusively from the personal search of co-accused Akib Ali Khan. There is nothing on record to infer that co-accused Akib Ali Khan had possessed the contraband with the meeting of mind with the present appellant. Merely because the present appellant and co-accused Akib Ali Khan were travelling together in a car it cannot be concluded that the contraband recovered from the personal search of co-accused Akib Ali Khan was in the joint possession of all the occupants of the car or that the appellant was in any way in constructive possession of the contraband or there was any criminal conspiracy amongst the occupants of the car. To support this view reference can be made to the cases **Ravi S/o Darshanlal Gupta versus State of Maharashtra, 2005 (1) ALL MR (Cri) 701** and **Mohd. Ameer versus State of Rajasthan, 2007 Criminal Law Journal 1757**.

17. There is no allegation or proof from the side of the prosecution that the present appellant knew or was having knowledge that co-accused Akib Ali Khan was in possession of the contraband. Thus, in these circumstances, the contraband recovered as a result of the personal search of co-accused Akib Ali Khan cannot be attributed to the present appellant.

18. Case **Madan Lal and another versus State of Himachal Pradesh** (supra) relied upon by the learned State counsel is quite distinguishable on facts, as in that case, the bag containing charas was

recovered as a result of search of the car. So, the occupants of the car were found to be having the knowledge about the transportation of the charas and each had a role in the transportation and in the possession with conscious knowledge as to what they were doing but herein, in this case, no incriminating article has been recovered from the car or the personal search of the appellant. The recovery has only been effected from the pocket of co-accused Akib Ali Khan.

19. Thus, keeping in view my aforesaid discussion, the prosecution has not been able to establish that appellant-Kayum Khan was found in possession/conscious possession of the contraband.

20. Consequently, the prosecution has not been able to establish its case beyond shadow of reasonable doubt against the present appellant.

21. Resultantly, the present appeal is hereby allowed. The conviction and sentence of the appellant as recorded by the learned trial Court vide impugned order of conviction and order of sentence are hereby set aside. Accused-appellant as a result of benefit of doubt stands acquitted of the charges.

August 24, 2015
ps

(DARSHAN SINGH)
JUDGE

